92-743

No. 92-

Supreme Court, U.S.
FILED
OCT 27 1992
OFFICE OF THE C...

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROSEMARY ECKERSLEY and ESTATE OF
DR. FRANKLIN ASHLEY, by
ROSEMARY ASHLEY (ECKERSLEY), Executrix PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. STUMPF, JR.
JOSE H. GARCIA
Bronson, Bronson & McKinnon
505 Montgomery Street
San Francisco, CA 94111-2514
(415) 986-4200

SHELDON S. COHEN *
PETER BUSCEMI
MELISSA B. ROGERS
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether, in order to be valid and enforceable, an agreement to waive the statute of limitations between a taxpayer and the Internal Revenue Service requires a mutual understanding of the terms and scope of the waiver, in accordance with basic principles of contract law.

2. Whether, in addressing the validity and scope of an alleged waiver, courts should consider all communications between taxpayers and their representatives and the IRS, including communications to and from a legal assistant acting under the supervision of the taxpayers' counsel.

LIST OF INTERESTED PARTIES

The caption includes all parties that appeared in the court of appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
Factual Background	4
The District Court Proceedings	7
The Court of Appeals' Decision	9
REASONS FOR GRANTING THE PETITION	9
I. IN THE ABSENCE OF MUTUAL ASSENT AS TO THE TERMS OF WAIVER, THERE IS NO AGREEMENT, AND A PURPORTED WAIVER SHOULD BE CONSIDERED VOID AND UNENFORCEABLE	11
II. THE COURT OF APPEALS CANNOT JUSTIFY ITS DECISION BY QUESTIONING THE AUTHORITY OF THE LEGAL ASSISTANT WORKING UNDER PETITIONERS' TAX COUNSEL	14
CONCLUSION	15

TABLE OF AUTHORITIES

CASES: Page

Cary v. Commissioner, 48 T.C. 754 (1967) 11
Courson v. Commissioner, 59 T.C.M. (CCH) 429 (1990) 13
Grunwald v. Commissioner, 86 T.C. 85 (1986) 11
Hicks v. Commissioner, 62 T.C.M. (CCH) 1234 (1992) 10, 12
Piarulle v. Commissioner, 80 T.C. 1035 (1983) 11
Scheuerman v. Commissioner, 47 T.C.M. (CCH) 1394 (1984) 13
Smith v. Commissioner, 56 T.C.M. (CCH) 1373 (1989) 10, 12, 13
Windfall Grain Co. v. Commissioner, 23 B.T.A. 725 (1931) 10, 13

STATUTES:

26 C.F.R. § 301.6501(c)-1(d) (1991) 2
26 U.S.C. § 6501(a) 2
26 U.S.C. § 6501(c)(4) 2, 10
28 U.S.C. § 1254(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-

ROSEMARY ECKERSLEY and ESTATE OF
DR. FRANKLIN ASHLEY, by
ROSEMARY ASHLEY (ECKERSLEY), Executrix, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Rosemary Eckersley and the Estate of Dr. Franklin Ashley, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment and opinion of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is not reported. The judgment and opinion of the district court (App. B and App. C, respectively) are not reported. The district court's order denying the motion to alter or amend judgment (App. D) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1992. A timely petition for rehearing was denied on June 29, 1992. App. E. On September 22, 1992, Justice O'Connor entered an order extending the time for filing a petition for a writ of certiorari to and including October 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 6501(a) of the Internal Revenue Code provides:

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

Section 6501(c)(4) of the Internal Revenue Code provides:

> Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

26 C.F.R. § 301.6501(c)-1(d) (1991) provides:

> The time prescribed by section 6501 for the assessment of any tax (other than the estate tax imposed by chapter 1 of the Code) may, prior to the expira-

tion of such time be extended for any period of time agreed upon in writing by the taxpayer and the district director or an assistant regional commissioner. The extension shall become effective when the agreement has been executed by both parties. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

STATEMENT OF THE CASE

This case concerns the validity and scope of a purported waiver of the statute of limitations executed by two taxpayers, Dr. and Mrs. Franklin Ashley, at the request of the Internal Revenue Service ("IRS"). Absent an enforceable waiver, the statute of limitations for assessing additional taxes has expired and the taxpayers are entitled to a refund.[1]

When the IRS requested the waiver, it did so by sending the taxpayers a waiver form accompanied by a cover letter explaining that the IRS wished to complete its investigation of "the Harvest partnership issue" and that a waiver was needed for that purpose. Accepting that explanation, the taxpayers executed the waiver and returned it to the IRS with a letter confirming that the waiver was intended to enable the IRS to complete its examination of Harvest Partners.

Nearly three years later, however, the IRS disallowed deductions—and proposed to collect additional taxes—not only for the Harvest partnership but also for another partnership that the IRS had not even mentioned to the taxpayers until several months after they executed the waiver. Approximately 75% of the proposed additional taxes related to the latter partnership.

---

[1] Dr. Ashley died in February 1985, three weeks after the IRS alleged the deficiencies at issue in this case. Petitioners are Dr. Ashley's widow (Rosemary Eckersley) and his estate. Mrs. Eckersley is the executrix of the estate.

As the IRS itself acknowledged in the courts below, the taxpayers and the revenue agent reached "no clear understanding" as to the scope of the purported waiver. In the absence of such a "meeting of the minds," the purported waiver should have been declared a nullity. At a minimum, the waiver should have been restricted to the Harvest partnership. The district court and the court of appeals, however, disregarded the lack of any clear understanding between the parties and held that the waiver form was clear and unlimited on its face.

Factual Background

Petitioner Rosemary Eckersley and her late husband, Dr. Franklin Ashley, filed timely joint federal income tax returns for the calendar years 1978 and 1979. They paid more than $107,000 in federal income taxes. App. A at 2a. Subsequently, as a result of an IRS audit, the taxpayers made two additional payments of taxes and interest for the same years. The additional payments exceeded $115,000. In June 1983, after the second of these additional payments, the IRS released a tax lien on the taxpayers' property.

Without an agreement extending the limitations period, the time for assessing additional taxes for 1978 and 1979 would have expired on April 15, 1982 and April 15, 1983, respectively. I.R.C. § 6501(a). On February 17, 1982, Revenue Agent Masahide Zakahi sent a Form 872-A for the tax years 1978 and 1979 to Scott Brown, a legal assistant employed by Robert Shahin, petitioners' tax counsel. App. A at 3a. A Form 872-A is called a Special Consent to Extend the Time to Assess Tax. It is a written agreement between the IRS and a taxpayer through which the taxpayer waives the applicable three-year statute of limitations. Ordinarily, the waiver remains in effect until the IRS completes its audit and makes a final determination or until the taxpayer submits a Form 872-T revoking the waiver. The parties may, however, agree to limit the scope of the waiver, either as to time or

as to the items covered. Agreement between the IRS and the taxpayer is essential for any effective waiver.

In his cover letter accompanying the Form 872-A, Mr. Zakahi explained the IRS's reason for requesting an extension of the statute of limitations. He stated:

> the partnership return of Harvest of which Franklin Ashley is a partner is currently under examination. Since we intend to . . . place the case in our suspense section until the resolution of the Harvest partnership issue, the extension on Form 872-A is solicited.

App. A at 3a. The Harvest partnership was the only issue regarding 1978 and 1979 mentioned in the revenue agent's letter. Mr. Zakahi has admitted that he mentioned Harvest Partners in his cover letter both to inform the taxpayers of the continuing audit and to persuade them to execute the waiver. Zakahi Depo. 81-82. Mr. Zakahi has also acknowledged that there was nothing in his February 17, 1982 letter that would have suggested to the taxpayers that the years 1978 and 1979 were going to remain open for any item other than Harvest Partners. *Id.* at 94.

The taxpayers signed the Form 872-A, and Mr. Brown returned it to Mr. Zakahi along with a cover letter that confirmed the limited scope of the waiver. Mr. Brown's letter stated: "I would like to confirm that upon the Ashleys' submission of Form 872-A for tax years 1978 and 1979, those years will be closed pending completion of [the IRS's] examination of Harvest Partners." App. A at 3a.

Upon receipt of the executed waiver, Mr. Zakahi delivered the document, together with Mr. Brown's cover letter and the entire correspondence file, to his supervisor, Sharon Rivard. Zakahi Depo. 84-87. Ms. Rivard signed

the waiver for the IRS on March 1, 1982.[2] Rivard Depo. 31-33.

On July 9, 1982, *more than four months* after the waiver form was executed, Revenue Agent Zakahi sent Mr. Brown another letter, this time enclosing a form that reflected the first of the Ashleys' two additional tax payments for 1978 and 1979. Mr. Zakahi's July 9 letter announced for the first time that the IRS intended to include in its further examination matters other than the Harvest partnership. The letter stated that "the case will be held in suspense until closure of the Harvest Partnership for the taxable years 1978 and 1979 and Comark Partnership for the taxable year 1979." App. A at 4a. This was the first indication to the taxpayers that the IRS did not consider the waiver to be limited to the Harvest partnership.

The taxpayers immediately rejected any attempt by the IRS to extend the scope of the waiver. On July 13, 1982, Mr. Brown informed the IRS by letter that the Comark partnership was not within the scope of the Form 872-A waiver. App. A at 4a. The letter stated:

> In February, 1982, you agreed to close 1977, 1978 and 1979 pending a completion of the audit of Harvest Partners. This was agreed to by the taxpayer. You now want to include CoMark as an open item for 1979 . . . . We must object to your inclusion of CoMark in the Ashley's 1979 tax year since it was embodied as an open item after we struck our agreement.

The IRS never responded to Mr. Brown's letter. The taxpayers heard nothing further about the matter until January 1985. At that time, when Dr. Ashley was terminally ill and hospitalized in Texas, with his wife in attendance, the IRS notified the Ashleys, through their ac-

---

[2] The IRS does not dispute that Ms. Rivard received the correspondence between Brown and Zakahi. The court of appeals simply erred in stating that Ms. Rivard did not receive the correspondence. App. A at 3a.

countant in California, that it was disallowing all deductions claimed with respect to the Harvest partnership and the Comark partnership for 1978 and 1979 and that it was proposing income tax deficiencies of more than $400,000 for those two years. Mem. of Points and Authorities in Support of United States' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("Gov't Mem."), Wong Aff., Exh. A.

The taxpayers, through their accountant, immediately protested, noting simply that they disagreed with the IRS position and had not been given any opportunity to discuss the matter with the IRS. Wong Aff., Exh. B. Dr. Ashley died less than two weeks after the protest was submitted. The IRS then took more than three and a half years to address their administrative appeal. Finally, in September 1988, nearly ten years after the tax years at issue, the IRS announced that it would allow part of the deductions claimed for the two partnerships, and it assessed additional taxes in the total principal amount of $297,660. Wong Aff., Exh. G. More than $222,000 of this amount was attributable to the Comark partnership. The IRS also claimed interest in the amount of nearly $525,000.

In August 1989, petitioners paid the full principal amount of additional taxes assessed, $72,447 for 1978 and $225,213 for 1979. Simultaneously, petitioners sought a refund of that amount. App. A at 5a. The IRS denied the request for a refund, and petitioners began this action for a refund in the United States District Court for the Northern District of California.

The District Court Proceedings

Petitioners moved for summary judgment in the district court. They argued that, given the absence of any "meeting of the minds" between the IRS and the taxpayers regarding the scope of the Form 872-A waiver of the statute of limitations, no agreement had been reached, no mutual assent had been obtained, and the waiver

therefore was invalid. In the alternative, petitioners contended that, if there was a valid waiver, it was limited to the single item specifically mentioned by the IRS in Mr. Zakahi's February 1982 cover letter, the Harvest partnership.

The IRS cross-moved for summary judgment. Although the IRS acknowledged that the parties did not reach any mutual understanding as to the scope of the Form 872-A waiver, it nevertheless urged the court to find a valid unrestricted waiver. The IRS stated, "[i]t is evident from a comparison of the language of both cover letters that Scott Brown and revenue agent Zakahi *had no clear understanding at all as to whether the 872-A waiver would be restricted or not*" (emphasis added). Gov't Mem. at 22. The IRS further admitted that Mr. Zakahi's letter soliciting a waiver and Mr. Brown's response letter forwarding the executed form were talking about "two completely different things . . . ." *Id.* Notwithstanding this admission, the IRS argued that the court should find an unrestricted waiver by focusing solely on the language of Form 872-A. In the alternative, the IRS argued that, if the waiver was somehow restricted, it was limited only as to time, not as to subject matter, and that the IRS complied with the temporal restriction by disallowing the Comark partnership deduction at the same time as it disallowed the Harvest partnership deduction.

Acting without benefit of a hearing, the district court denied petitioners' motion and granted the IRS's cross-motion for summary judgment. App. C. In a terse opinion, the district court disregarded the IRS's admission that "there was no clear understanding" between the parties as to the scope of the waiver and ruled that Form 872-A was an unrestricted waiver on its face. *Id.* at 13a. The district court further ruled that, if the waiver was restricted, it was restricted as to time and not as to the issues that the IRS might examine. *Id.*

The Court of Appeals' Decision

The court of appeals affirmed. App. A. Initially, the court acknowledged that to effect a waiver of the statute of limitations, there must be a written agreement between the IRS and the taxpayer, and that agreement must involve mutual assent. *Id.* at 6a. Although a waiver is not a formal contract (because no consideration is required), it *is* an agreement between the parties, and the court of appeals acknowledged that "contract principles are important" in determining whether any such agreement exists and, if so, what terms are included. *Id.* The court then declared that it would examine "the parties' overt acts to find objective manifestations of mutual assent." *Id.* The court erred, however, in conducting this examination.

Adopting a cramped view of "objective manifestations of mutual assent," the court dismissed the significance of the correspondence between Agent Zakahi and Mr. Brown, and concentrated instead on the Form 872-A standing alone, as if it had been executed in a vacuum. The court of appeals also disregarded the IRS's express acknowledgment that there was "no clear understanding at all" between the parties as to whether the waiver would be restricted or not. Instead of finding on that basis that there was no mutual agreement as to the scope of the waiver, and that the waiver was therefore invalid, the court of appeals ruled, in a bizarre twist of logic, that the waiver was unlimited. App. A at 8a. The court stated (*id.*):

> The only agreement of which there is objective manifestations of assent on behalf of both parties is the Form 872-A itself. We therefore find the waiver to be valid with no restrictions or limitations.

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question about the application of basic contract law principles to waivers of the statute of limitations under the Internal

Revenue Code. It is common ground (because Section 6501(c)(4) of the Code expressly so provides) that such waivers require a written *agreement* between the taxpayer and the IRS. Because an agreement is essential to a valid waiver, the familiar contract principles of offer and acceptance are critical. Where objective evidence (such as cover letters or other correspondence) shows that the parties have not reached a mutual understanding about the scope of a proposed waiver—and particularly where the IRS itself concedes that no such understanding has been reached—application of ordinary contract principles should lead to the conclusion that there is no agreement and, hence, that there is no effective waiver. The court of appeals' decision in this case stands these fundamentals on their head and simply assumes that, where the parties have reached no clear understanding as to the scope of a waiver, a waiver should nevertheless be recognized and should be unlimited.

Moreover, the Ninth Circuit's opinion represents a significant departure from previous decisions of the Tax Court regarding the significance of comments and conditions contained in correspondence between taxpayers and the IRS regarding the execution of waiver forms. The Tax Court has consistently ruled that such conditions or restrictions can limit the scope and validity of the waiver. *See, e.g., Hicks v. Commissioner*, 62 T.C.M. (CCH) 1234, 1236 (1992); *Smith v. Commissioner*, 56 T.C.M. (CCH) 1373, 1378 (1989); *Windfall Grain Co. v. Commissioner*, 23 B.T.A. 725 (1931). The court of appeals here failed to accord adequate weight to the correspondence between the parties as evidence of whether the required mutual assent was obtained, and, if so, whether and in what way that assent was conditioned.

This Court should grant review to establish clear principles governing both the creation of valid waiver agreements and the imposition of valid conditions on those agreements. In the absence of such intervention, taxpayers,

the IRS, and the lower federal courts will continue to lack needed guidance about the requisite manifestations of agreement and restrictions in the waiver context.

I. IN THE ABSENCE OF MUTUAL ASSENT AS TO THE TERMS OF WAIVER, THERE IS NO AGREEMENT, AND A PURPORTED WAIVER SHOULD BE CONSIDERED VOID AND UNENFORCEABLE.

An agreement to extend the limitations period under the Internal Revenue Code requires the mutual assent of both parties. *E.g., Piarulle v. Commissioner*, 80 T.C. 1035, 1042 (1983). Mutual assent to the terms of a waiver is essential to a finding that the waiver is valid and enforceable.[3] Under basic contract principles, a lack of mutual assent renders a purported agreement void and unenforceable. Although waivers under the Code are not technically contracts, it is well-settled that contract principles are important in determining whether an agreement has been reached and in interpreting the terms of such an agreement. *See, e.g., Grunwald v. Commissioner*, 86 T.C. 85, 89 (1986).

Here, the IRS admitted in its cross-motion for summary judgment that the parties lacked an understanding "as to whether the 872-A waiver would be restricted or not." Due to the lack of mutual assent, this waiver could not constitute a binding contract. The court of appeals, however, ruled that the waiver was valid and unrestricted. In reaching its decision, the court ignored both the principle of mutual assent and the uncontroverted evidence that there was a lack of mutual assent to the scope of the waiver.

---

[3] Indeed, courts have refused to find a valid waiver when the IRS has unilaterally altered the terms on the waiver form after the form has been executed by the taxpayers. *Piarulle*, 80 T.C. at 1035 (IRS altered the years that were covered by the waiver); *Cary v. Commissioner*, 48 T.C. 754 (1967) (IRS changed the year covered by the waiver). In such cases, there can be no mutual assent to the terms of the waiver.

The court of appeals failed to recognize the significance of the parties' correspondence for the determination of whether there was mutual assent to the scope of the waiver. Although paying lip service to the principle of mutual assent, the court dismissed the crucial evidence of the parties' divergent understandings, namely, the exchange of letters between the taxpayers' representative and the IRS.

The Tax Court consistently considers correspondence between the taxpayer and the IRS to determine if there is mutual assent. *Hicks*, 82 T.C.M. (CCH) at 1236; *Smith*, 56 T.C.M. (CCH) at 1373. In *Hicks*, the Tax Court considered the correspondence from the IRS to the taxpayer and determined that the correspondence indicated a lack of mutual assent as to the restricted terms of the waiver. The taxpayers were led to believe that the waiver was restricted while the IRS believed that it was unrestricted. The court found that there was no mutual assent, so the waiver was invalid and unenforceable. Likewise, in *Smith*, the Tax Court held that a Form 872 waiver was invalid when the taxpayers' cover letter was separated from the form prior to the IRS's execution of the form. The cover letter contained a restriction that limited the scope of the waiver. The court noted that the taxpayers' "objective manifestation of assent was contained in . . . the conditional cover letter to the Form 872." *Smith*, 56 T.C.M. (CCH) at 1379. Since the IRS agent had not read the cover letter prior to executing the form on behalf of the IRS, the court found that he could not have agreed to the restrictions. The court, therefore, ruled that there was no mutual assent to the scope of the waiver, and the waiver was invalid.

Similarly, the correspondence between Brown and Zakahi represented the "objective manifestations" of the parties' intent. As the IRS itself has acknowledged, there was no mutual assent to the scope of the waiver. As *Hicks* and *Smith* illustrate, when there is no mutual assent

to the scope of the waiver, the waiver should be invalid and unenforceable. The court of appeals, however, ruled that, notwithstanding the lack of agreement on the scope of the waiver, the waiver was not only valid and enforceable, but unlimited as well.

Although the IRS in the courts below placed much emphasis on the unrestricted nature of the Form 872-A waiver, it is a well-settled rule that restrictions on such waivers may be set forth in accompanying cover letters from the taxpayer to the IRS. *Windfall Grain Co. v. Commissioner*, 23 B.T.A. 725 (1931); *see also Scheuerman v. Commissioner*, 47 T.C.M. (CCH) 1394 (1984). In *Windfall Grain Co.*, 23 B.T.A. at 730, the Board of Tax Appeals held that the letter accompanying the waiver "formed a part of" the waiver itself. Therefore, the restrictions or conditions contained in the accompanying letter were restrictions or conditions on the scope of the waiver. The Board held that, by accepting the letter and signing the accompanying waiver, the IRS had agreed to the conditions or restrictions set forth in the cover letter.

In *Smith v. Commissioner*, 56 T.C.M. (CCH) 1373, the court rejected the IRS's argument that conditions or restrictions must be placed on the face of the form itself, and reaffirmed the proposition that conditions or restrictions contained in the accompanying cover letter to the IRS are binding if the IRS decides to sign the waiver form. *Id.* at 1378-79. As the court stated in *Courson v. Commissioner*, 59 T.C.M. (CCH) 429, 432 (1990),

> [w]here taxpayers reduced their belief to a writing associated with the consent and forwarded it to respondent for execution, we have granted relief from a consent which appeared valid or unrestricted on its face.

Here, even if the court of appeals was determined to find *some* waiver, that waiver should have been limited to the Harvest partnership. To the extent there was any overlap between the parties' divergent understandings,

that overlap was limited to the Harvest issue. Any valid waiver could be no broader than the sole issue that *both* parties intended to include in any agreement they reached.

II. THE COURT OF APPEALS CANNOT JUSTIFY ITS DECISION BY QUESTIONING THE AUTHORITY OF THE LEGAL ASSISTANT WORKING UNDER PETITIONERS' TAX COUNSEL.

In the last paragraph of its opinion, the court of appeals attempted to cite as an alternative ground for its decision the fact that Mr. Brown, Mr. Shahin's legal assistant, signed the letters to the IRS on behalf of the Ashleys. App. A at 8a. The court adopted the IRS's argument, made for the first time on appeal, that Mr. Brown was "not enrolled to practice before the IRS," and that his letters therefore were irrelevant.

This aspect of the court of appeals' opinion is without merit. The importance of the letters signed by Mr. Brown is not that they are somehow "binding" on the IRS, but rather that they indicate the lack of any mutual understanding between the parties. There is no suggestion that Mr. Brown was acting in any way other than in accordance with instructions from the taxpayers' attorney, Mr. Shahin. Mr. Brown was merely an agent of the taxpayers' authorized representative, and the court of appeals has identified no authority that could justify disregarding Mr. Brown's letters. That is particularly so in light of the fact that Mr. Brown's February 1982 cover letter accompanied the waiver form that was signed by the taxpayers themselves.

Moreover, it is disingenuous for the IRS to argue now that Mr. Brown was not an agent for the taxpayers. The IRS did not object to Mr. Brown's role as a correspondent until this case reached the Ninth Circuit, some nine years after the communications at issue. The IRS corresponded directly with Mr. Brown for a period of at least five

months in 1982, and considered him the contact person for the taxpayers. Indeed, Revenue Agent Zakahi *initiated* the very waiver correspondence here in dispute, by writing to Mr. Brown in February 1982. For the IRS now to claim that Mr. Brown's response was unauthorized and should be ignored is simply untenable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. STUMPF, JR.
JOSE H. GARCIA
Bronson, Bronson & McKinnon
505 Montgomery Street
San Francisco, CA 94111-2514
(415) 986-4200

SHELDON S. COHEN *
PETER BUSCEMI
MELISSA B. ROGERS
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

* *Counsel of Record*

October 27, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-15059

D.C. No. CV-89-03349-JPC

ROSEMARY ECKERSLEY and ESTATE OF DR. FRANKLIN ASHLEY, DECEASED, BY ROSEMARY ASHLEY (ECKERSLEY), EXECUTRIX, PLAINTIFFS-APPELLANTS

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued and Submitted February 14, 1992
San Francisco, California

MEMORANDUM*

[Filed Apr. 24, 1992]

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: HALL, WIGGINS, Circuit Judges, MUECKE** District Judge

OVERVIEW

Appellants appeal the grant of summary judgment against them and in favor of the government. Appellants sought a refund for tax assessments paid for the years 1978 and 1979, claiming the assessments were barred by the statute of limitations. The Internal Revenue Service ("IRS") maintains that appellants signed a valid waiver of the statute of limitations defense and cannot now claim that defense. Appellants argue that the waiver was not valid because there was no agreement as to its scope. In the alternative, appellants claim that the waiver was limited to one subject, a limitation with which the IRS failed to comply. The IRS argues, and the district court found in granting summary judgment, that the waiver was valid and unconditional. If the parties did agree to a limitation, the district court determined that it was a time limitation, with which the IRS properly complied. This court has jurisdiction over the timely appeal pursuant to 28 U.S.C. section 1291, and we affirm.

STATEMENT OF FACTS

Rosemary Ashley Eckersley and her then husband, Dr. Franklin Ashley ("Ashleys"), filed joint federal income tax returns for the years 1978 and 1979 on or before April 15, 1979, and April 15, 1980, respectively. In May of 1980, the IRS began a review of the Ashleys' tax returns. The period for assessing any additional amounts for the Ashleys' 1978 and 1979 tax years would have expired on April 15, 1982 and April 15, 1983, respectively.

** Hon. Carl A. Muecke, United States District Judge for the District of Arizona, sitting by designation.

On February 17, 1982, IRS Revenue Agent, Masahide Zakahi, sent a Form 872 [1] for the tax year 1977, and a Form 872-A [2] for the tax years 1978 and 1979 to Scott Brown, a legal assistant at the law firm representing the Ashleys in the tax matters. The forms were not signed by the IRS. The cover letter sent with the forms said that the Form 872-A for tax years 1978 and 1979 would extend the statute of limitations indefinitely. The letter said that such extension was necessary because:

> the partnership of Harvest of which Franklin Ashley is a partner is currently under examination. Since we intend to solicit a partial agreement for the taxable years 1978 and 1979 based on the closing agreement and place the case in our suspense section until the resolution of the Harvest partnership issue, the extension of Form 872-A is solicited.

The Ashleys signed the Form 872-A on February 25, 1982, and Brown returned the form with an accompanying letter dated February 22 to Zakahi. The letter said in part that Brown "would like to confirm that upon the Ashleys' submission of Form 872-A for tax years 1978 and 1979, those years will be closed pending completion of your examination of Harvest Partners." Zakahi forwarded the form and the case file to his group manager, Sharon Rivard. Rivard reviewed the waiver and executed it on behalf of the IRS on March 1, 1982. She had not received the correspondence between Zakahi and Brown.

---

[1] Form 872 is a Consent to Extend the Time to Assess Tax; it is a waiver of the statute of limitations defense by the taxpayers. It is fixed to expire on a certain date unless a notice of deficiency is issued on or before the date specified on the form.

[2] Like a Form 872, an 872-A is a waiver of the statute of limitations. This form, however, has no fixed time limit. It extends the statute of limitations indefinitely until the taxpayer or IRS revokes it using the means specified in the agreement.

On May 21, 1982, appellants signed a Form 906, a Closing Agreement as to Final Determination Covering Specific Matters. A Form 906 is used when the taxpayers and the IRS have reached agreements on specific issues only. On July 9, 1982, Zakahi mailed a Form 870 to Brown which reflected the agreement reached in the closing agreement. The letter accompanying the form stated that the case "will be held in suspense until the closure of the Harvest Partnership for the taxable years 1978 and 1979 and Comark Partnership for the taxable year 1979."

On approximately July 13, 1982, Brown returned the signed Form 870, but sent a cover letter objecting to the review of the Comark Partnership.

> In February, 1982, you agreed to close 1977, 1978 and 1979 pending a completion of the audit of Harvest Partners. This was agreed to by the taxpayer. You now want to include CoMark as an open item for 1979 (reference June 7, 1982 letter). We must object to your inclusion of CoMark in the Ashley's 1979 tax year since it was embodied as an open item after we struck our agreement.

Under the Form 870, appellants paid the amount assessed by the IRS and never made any objection to this amount.

On approximately January 22, 1985, the IRS notified appellants that they were disallowing partnership deductions for the years 1978 and 1979 relating to the Harvest Partnership and for the year 1979 relating to the Comark Partnership. The proposed income tax deficiencies were stated as $95,174.97 for 1978 and $309,373 for 1979.

Appellants new representative, Gerald Chapnick, filed a protest, which did not allege a statute of limitations defense. Appeals Officer Wong handled the protest and negotiated with appellants' representatives. Franklin Ashley died on February 13, 1985, and Rosemary Ashley

(now Eckersley) became executrix of his estate. Appellants and the IRS reached a settlement, permitting deductions of $50,000 in the Harvest partnership and $150,000 in the Comark partnership. The settlement was reflected in a Form 870-AD, which Rosemary Eckersley signed. The IRS received the form on September 22, 1988 and signed it. Wong closed the case.

Appellants were assessed taxes in the amount reflecting the agreement. They paid the assessment, without interest, on August 16, 1989, and at the same time, filed for a refund. Nine days letter [*sic*], their request for a refund was denied. On September 8, 1989, appellants filed this refund suit. After the IRS filed its answer, both parties filed for summary judgment.

The district court denied the taxpayers' motion for summary judgment without hearing on October 5, 1990. The court granted summary judgment in favor of the IRS.

DISCUSSION

Because this is a review of a grant of summary judgment, the standard of review is de novo. *Lucero v. Hart*, 915 F.2d 1367, 1370 (9th Cir. 1990).

Ordinarily, under section 6501(a) of the Internal Revenue Code, tax deficiencies must be assessed against a taxpayer within three years of the filing of the tax return. Otherwise, such deficiencies are barred by the statute of limitations. Under section 6501(c)(4), however, the taxpayer and IRS may execute a waiver of the statute of limitations for an agreed upon amount of time. The IRS uses two types of waivers. The first, a Form 872, expires on a stated date. The second, a Form 872-A, waives the statute of limitations for an indefinite period of time. To terminate it, a taxpayer must send the IRS a Form 872-T, a Notice of Termination of Special Consent to Extend the Time to Assess Tax. The IRS may terminate the 872-A by mailing to the taxpayer either a

Form 872-T or a notice of a deficiency in taxes for the relevant tax period. Absent any of these actions, the 872-A expires when the IRS makes a final assessment, reflecting the final determination of taxes, including any administrative appeals.

An 872 or 872-A waiver is not a contract, but rather a waiver of a defense by the taxpayer. *Piarulle v. Commissioner*, 80 T.C. 1035, 1042 (1983). Section 6501(c)(4) requires the parties to reach a written agreement, so contract principles are important. Such an agreement does require mutual assent, but not consideration. *Tallal v. Commissioner*, 77 T.C. 1291, 1294 (1981). Whether the parties have made an agreement is determined by examining the parties' overt acts to find objective manifestations of mutual assent. 1 S. Williston, *Contracts*, § 22 (3rd ed. 1957); 1 *Restatement (Second) of Contracts*, § 19 (1979).

When the deficiency is issued by the IRS beyond the ordinary statute of limitations, the IRS bears the burden of showing a valid waiver. *Adler v. Commissioner*, 85 T.C. 535, 540 (1985). When the government can show a facially valid waiver, the burden shifts to the taxpayer to show that the waiver is invalid or somehow limited. The ultimate burden of proof always remains with the taxpayer. *Id.*

Appellants contend that there was no mutual assent to the Form 872-A and that the form is therefore void. This argument is based on the taxpayers' belief that the form was limited to the Harvest partnership, while the IRS believed the form was unlimited. But the tax cases are clear that what the parties subjectively believe or intend is no substitute for what was objectively stated. "[I]t is the objective manifestation of mutual assent as evidenced by the parties' overt acts, not the parties' intentions, that we must take into account in deciding whether the parties have reached an 'agreement' to extend the limitations period." *Ribb v. Commissioner*, T.C.

Memo. 1988-379, 55 T.C.M. (CCH) 1597, 1600 (1988) (citations omitted).

The Form 872-A is unambiguous and signed by both parties. There is no clear language in the Brown letter indicating that the signing of the form was conditional. The tax courts have said that clear, unambiguous language is necessary to limit such forms.

> There is no dearth of cases in which the taxpayer has taken the position that the restrictive terms of a transmittal letter accompanying an otherwise unrestricted Form 872 preclude a finding of the mutual assent necessary for a valid agreement to extend the period of limitations. . . . Notably, while the transmittal letters in each of the above referenced cases referred to the revenue agent's need to further examine a particular item, none of the letters purported to restrict the scope of the examination to the item so mentioned. Accordingly, we agreed with the respondent in those cases that the unrestricted Forms 872 executed by the parties were valid despite the taxpayers' reliance on language contained in the transmittal letters.

Hicks v. Commissioner, 62 T.C.M. (CCH) 1234, 1236 (1991), citations omitted.[3]

Appellants rely on the *Hicks* case to support their contention that there was no agreement. But the *Hicks* court found explicit language in the transmittal letter limiting the audit to one item. Unlike the Zakahi letter, which mentioned a particular item under review but did not

---

[3] In one such case, *Sager v. Commissioner*, 55 T.C.M. (CCH) 758 (1988), the transmittal letter from the IRS requesting the waiver expressly mentioned two partnership investments which the IRS was investigating and needed more time to complete such investigations. The letter did not mention another item for which the taxpayers were later assessed a tax deficiency. It did not matter that taxpayers thought the waiver was limited to the two partnerships, the court said. There was no such express limitation. *Id.*

expressly limit the waiver to that item, the IRS letter in *Hicks* said, "[t]he only issue that I will be auditing on your 1984 return is the Schedule E loss . . . ." *Hicks*, 62 T.C.M. at 1235. In *Hicks*, the IRS then failed to limit its review to the Schedule E loss. The *Hicks* court thus found the waiver invalid. In contrast, Zakahi did not promise to limit the audit to the Harvest partnership. He simply explained to taxpayers that the partnership was under review and that the case would be open pending that review. The Brown letter sent with the taxpayers' executed Form 872-A mentions the Harvest partnership, but it fails expressly to limit the waiver. The only agreement of which there is objective manifestations of assent on behalf of both parties is the Form 872-A itself. We therefore find the waiver to be valid with no restrictions or limitations.

Even if we were willing to find a conflict between what the IRS believed and what Brown believed, the result in this case would not change. Brown had no authority to negotiate on behalf of the Ashleys, and therefore, his letter could not effect the waiver execution. Brown was merely a legal assistant—not the Ashleys' attorney or authorized representative. To be authorized to represent the Ashleys before the IRS, Brown had to be an attorney, a certified public accountant or an agent authorized to practice before the IRS. 31 C.F.R. §§ 10.2-3 (1991). Because he was not, the IRS would not have been able to bind the Ashleys to anything Brown signed. Similarly, the IRS was not bound by anything Brown attempted to negotiate. Therefore, because Brown was not authorized to represent the Ashleys to the IRS, the letter accompanying the Form 872-A had no legal effect.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-89-3349-JPV

ROSEMARY ECKERSLEY and ESTATE OF
DR. FRANKLIN ASHLEY, DECEASED,
BY ROSEMARY ASHLEY (ECKERSLEY),
EXECUTRIX, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

Pursuant to and in accordance with this court's Order dated Oct. 5, 1990 granting defendants' Motion for Summary Judgment, judgment is hereby entered in favor of defendants and against plaintiffs.

IT IS SO ORDERED.

DATED: Oct. 5, 1990

/s/ J. P. Vukasin, Jr.
J. P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C89-3349-JPV

ROSEMARY ECKERSLEY and ESTATE OF
DR. FRANKLIN ASHLEY, DECEASED,
BY ROSEMARY ASHLEY (ECKERSLEY),
EXECUTRIX, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

[Filed Oct. 5, 1990]

INTRODUCTION

The parties' Cross-Motions for Summary Judgment were scheduled to be heard on September 6, 1990. After a review of the briefs, this court considered it appropriate to submit the motions on the pleadings pursuant to Local Rule 220-1, and now DENIES plaintiffs' motion and GRANTS defendant's motion.

BACKGROUND

Plaintiff Rosemary Eckersley and her late husband, Dr. Franklin Ashley, filed timely tax returns for 1978 and 1979 enclosing $39,124 and $68,028, respectively. A

1981-82 Internal Revenue Service ("IRS") audit of these returns resulted in an additional tax assessment of $40,959 for 1978 and $46,113 for 1979. On February 17, 1982, IRS agent Masahaide Zakahi sent a letter to plaintiffs in care of their tax attorney enclosing a Form 872-A waiver. The waiver extended indefinitely the statute of limitations for plaintiffs' 1978 and 1979 tax returns. The cover letter requested plaintiffs' signatures on the Form 872-A so that the audits could be placed in the "suspense section until the resolution of" the Harvest partnership issue. Plaintiffs signed the Form and returned it on February 22, 1982 with a cover letter from the office of their tax attorney confirming that the audit of the 1978 and 1979 tax years would, "be closed pending completion" of the IRS examination of Harvest Partners. The Form contained no restrictions on the waiver of the statute of limitations for tax years 1978 and 1979.

On July 9, 1982, Agent Zakahi sent plaintiffs' attorney a Form 870 reflecting a partial settlement as to tax years 1978 and 1979. His cover letter stated that "the case will be held in suspense until the closure of the Harvest Partnership for the taxable years 1978 and 1979 *and Comark Partnership for the taxable year 1979.*" (emphasis added). Plaintiffs returned the executed Form 870 with a cover letter from their attorney's office objecting to the inclusion of Comark as an "open item" for 1979, and stating: "In February, 1982, you agreed to close 1977, 1978, and 1979 pending a completion of the audit of Harvest Partners. This was agreed to by the taxpayer." The IRS did not respond to this letter.

In January, 1985, the IRS issued an examination report disallowing the Harvest partnership deductions for 1978 and 1979 and the Comark partnership deduction for 1979. The plaintiffs appealed, and ultimately settled with the IRS in 1989 by paying deficiencies of $297,660. Simultaneously, plaintiffs (Dr. Ashley died in 1985 and Mrs. Eckersley became executrix of his estate) claimed a re-

fund for 1978 and 1979. Following denial of the claim, this lawsuit was filed.

DISCUSSION

Summary judgment should be granted where it is shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). In *Celotex*, the Supreme Court made it clear that summary judgment, when appropriate, is a favored method of resolution, and that:

> summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322, 106 S.Ct. at 2552.

In addition, the Court emphasized in *Anderson* that, under Fed. R. Civ. P. 56(e), "when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511.

The central issue here is whether the cover letters sent by both sides effected any restriction on the waiver of the statute of limitations effected by plaintiffs' signing Form 872-A, and if so, what that restriction was. Plaintiffs contend that the cover letter of February 22, 1982 restricted the waiver of the statute of limitations to the Harvest Partners issue. Defendant contends that the statute was waived for all issues arising out of tax years 1978 and 1979.

"Where, as here, the consent is valid on its face and petitioner asserts that it is restricted or invalid as to certain issues, petitioner is again charged with the burden of going forward and affirmatively showing the invalidity of the written consent." *Schulman v. Commissioner*, 93 T.C. No. 53, ¶ 93.53 (1989) and cases cited therein. Plaintiffs have not met this burden.

Form 872-A was clear on its face, and provided for a general waiver. If plaintiffs objected to a general waiver of the statute of limitations they could have terminated the waiver by mailing a Form 872-T. The latter option was clearly indicated on the Form 872-A itself, and in any case should have been known to plaintiffs' attorney, a certified tax specialist. Moreover, it is readily apparent from the language of the cover letters that if the parties agreed to a restriction, they agreed to a *time* restriction and not to an *issue* restriction.

The key phrases are very similar. Defendant's letter states that the waiver was valid "until the resolution of the Harvest partnership issue," and plaintiffs' letter states the waiver was valid "pending completion of" the Harvest partnership issue. Thus, whether the cover letters intended different results hinges on the definition of the word "pending."

Webster's Third New International Dictionary (1976) defines "pending" as: "until the occurrence of or completion of." Therefore, plaintiffs' use of the word "pending" worked the same result as defendant's use of "until." If the parties agreed on a restriction, it was limited to the time required to audit Harvest Partners. It is undisputed that the IRS complied with this time restriction.

CONCLUSION AND ORDER

Plaintiffs will be held either to the unrestricted meaning of Form 872-A, or to the plain meaning of their cover letter. Under either view, the exchange of docu-

ments restricted the IRS to a time limitation with which the IRS complied.

Accordingly, Defendant's cross-motion for summary judgment is GRANTED, and plaintiffs' motion for summary judgment is DENIED.

IT IS SO ORDERED

DATED: Oct. 5, 1990

/s/ J. P. Vukasin, Jr.
J. P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C89-3349-JPV

ROSEMARY ECKERSLEY and ESTATE OF
DR. FRANKLIN ASHLEY, DECEASED,
BY ROSEMARY ASHLEY (ECKERSLEY),
EXECUTRIX, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

[Filed Dec. 19, 1990]

INTRODUCTION

Plaintiffs' Motion to Alter or Amend Judgment was scheduled to be heard on December 6, 1990. After a review of the briefs, this court considered it appropriate to submit the motions on the pleadings pursuant to Local Rule 220-1, and now DENIES plaintiffs' motion.

BACKGROUND

This court issued an Order Granting Defendant's Cross Motion for Summary Judgment (the "Order") on October 5, 1990. The effect of the Order was to let stand a settlement between plaintiffs and the IRS wherein the plaintiffs paid tax deficiencies of $297,660 for the tax years

1978 and 1979. Plaintiffs now move this court to amend or alter that decision pursuant to Fed. R. Civ. Pro. 59(e).

DISCUSSION

Plaintiffs' argument contains virtually no new reasoning or authority which would persuade this court to alter its Order. The essence of their argument was, and is, that there was no meeting of the minds between plaintiffs and the IRS as to a waiver of the statute of limitations for the tax years 1978 and 1979. The court is satisfied that the reasoning of the Order remains valid. Moreover, plaintiffs have a long history of tax avoidance, and they have never contended that their $297,660 tax liability was fundamentally erroneous. This court is not inclined to torture the logic of contract formation in order to find in favor of parties whose underlying acts do not merit relief.

Plaintiffs now argue for the first time that triable issues of fact exist which preclude summary judgment. The court does not find any material facts to be in dispute, but even if there were, Rule 59(e) cannot be used to expand the judgment to encompass new issues. *Ray E. Friedman & Co. v. Jenkins*, 824 F.2d 657, 660 (8th Cir. 1987).

ORDER

Accordingly, plaintiffs' Motion to Alter or Amend Judgment is HEREBY DENIED.

IT IS SO ORDERED

DATED: Dec. 1, 1990

/s/ J. P. Vukasin, Jr.
J. P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15059

D.C. No. CV-89-03349-JPV

ROSEMARY ECKERSLEY and ESTATE OF
DR. FRANKLIN ASHLEY, DECEASED,
BY ROSEMARY ASHLEY (ECKERSLEY),
EXECUTRIX, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

ORDER

[Filed Jun. 29, 1992]

Before: HALL and WIGGINS, Circuit Judges and MUECKE, District Judge

Appellants' petition for rehearing is DENIED.